

AUG 29 1979

MICHAEL ROMAK, JR. CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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No. 79-152

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THE HOME INDEMNITY COMPANY,  
*Petitioner,*

v.

BARBARA A. STILLWELL,  
*Respondent,*

and

R. E. LEE ELECTRIC COMPANY, INC.  
*Respondent,*

and

HEYL & PATTERSON INTERNATIONAL, INC.,  
*Respondent,*

and

TRAVELERS INSURANCE COMPANY,  
*Respondent.*

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**BRIEF IN OPPOSITION TO THE  
PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH  
CIRCUIT**

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## TABLE OF CONTENTS

	Page
OPINION BELOW .....	2
JURISDICTION .....	2
QUESTION PRESENTED .....	2
FEDERAL STATUTES AND REGULATIONS .....	2
STATEMENT OF THE CASE .....	3
ARGUMENT .....	3
CONCLUSION .....	9

### CASES CITED:

<i>Director, OWCP v. Eastern Coal Corporation</i> , 561 F.2d 632 (1977) .....	6
<i>Lockheed Overseas Corporation v. Pillsbury</i> , 58 F. Supp. 375 (S.D. Cal. 1944) .....	5
<i>Smith v. Board of Trustees, Southern Illinois University, et al</i> , B.R.B. No. 77-474, 8 BRBS 197 (1978) .....	5
<i>Vishniac v. University of Rochester, et al</i> , B.R.B. No. 76-431, 8 BRBS 21 (1978) .....	5
<i>Wisniewski v. United States</i> , 353 U.S. 901 (1957).....	6

### OTHER AUTHORITIES:

2A Sutherland on Statutory Construction (4th ed. C. Sands 1973).....	6
---	---

## Page

## STATUTES AND REGULATIONS CITED:

28 U.S.C. 41 .....	5, 9
33 U.S.C. 901, et. seq. ....	4
33 U.S.C. 921(c) .....	2, 3, 8
42 U.S.C. 1651, et. seq. ....	2, 3
42 U.S.C. 1651(a) .....	2, 4
42 U.S.C. 1653(b) .....	2, 4, 5, 7, 8
20 CFR Section 701.102 .....	4
20 CFR Section 702.348 .....	8
20 CFR Section 702.350 .....	8

APPENDIX A—Order of Dismissal of the United States Court of Appeals for the Sixth Circuit Court of Appeals, Filed May 1, 1979 ..... 1a

APPENDIX B—Longshoremen's and Harbor Workers' Compensation Act and Related Statutes, 20 CFR ..... 3a

APPENDIX C—Longshoremen's and Harbor Workers' Compensation Act and Related Statutes, 20 CFR ..... 8a

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Respondent, The Travelers Insurance Company, respectfully prays that the Petition for a Writ of Certiorari be denied.

### OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Petitioner's Appendix A) is reported at 597 F.2d 87. That Court's Order of dismissal, filed May 1, 1979, is printed as Appendix A hereto.

(Respondent believes that the administrative decisions below, Petitioner's Appendices B and C, are not pertinent to this Petition but agrees that these decisions are stated fully in Petitioner's Appendices.)

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

### QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit properly construe 33 U.S.C. 921(c) and 42 U.S.C. 1653(b) and thereby correctly deny jurisdiction over Petitioner's request for review?

### FEDERAL STATUTES AND REGULATIONS

#### A. Statutes

Respondent agrees that Petitioner's extracts of 42 U.S.C. 1653(b) are pertinent. In addition, Respondent extracts the following:

42 U.S.C. 1651(a) (Defense Base Act) (55 Stat. 622).

- (a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1977 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee. . . .

#### B. Regulations

Respondent agrees that the Petitioner's extracts from Title 20, Code of Federal Regulations contained in the Petition and Petitioner's Appendix D (pp. 34a-44a) are pertinent. For the convenience of this Court, Respondent sets out in full in Appendix B hereto the additional Code of Federal Regulations citations made by Petitioner, but omitted from its Appendix.

### STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the United States Court of Appeals (Petitioner's Appendix A, at pp. 2a-3a).

### ARGUMENT

#### I. *The Decision Of The United States Court Of Appeals For The Sixth Circuit Does Not Deprive Parties Of Their Rights To Due Process.*

The court below correctly held that review of a compensation order entered under the Defense Base Act (DBA) (42 U.S.C. 1651, et seq.) upon a decision by the Benefits Review Board must be made to a United States District Court. Petitioner's arguments regarding deprivations of due process rights are inapposite.



The decision below safeguards and applies the judicial review procedures provided by the Defense Base Act (42 U.S.C. 1653(b)). Thus, Petitioner appears to suggest that the Defense Base Act review procedures, which have existed since 1941, are now violative of due process. There is no decision of this Court, or any other, to support such a contention.

Petitioner's reference to a deputy commissioner's *decision* is not supported by a reading of 42 U.S.C. 1653(b). That Section refers only to a *compensation order*.

Both the statutory language of the Defense base Act (42 U.S.C. 1651(a)) and the provisions of Title 20 Code of Federal Regulations cited by Petitioner support the decision below. The provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, et seq.) (LHWCA) apply to the Defense Base Act only unless modified by the latter Act. Section 1653(b) of that Act clearly provides such a modification. Section 701.102 of Title 20 Code of Federal Regulations further recognizes the obvious differences between the LHWCA and the DBA (Petitioner's Appendix D, at pp. 34a-35a).<sup>1</sup>

Finally, Petitioner's assertion that 42 U.S.C. 1653(b) has, as its only purpose, the prescription of venue rather than jurisdiction is not supported by the

<sup>1</sup> 20 CFR 701.102. Inasmuch as the extensions of the LHWCA (see §701.101) incorporate by reference *nearly* all of the provisions of the LHWCA, such that the regulations governing the latter apply to the extensions *with very few exceptions*, it has been determined that no useful purpose would be served by repeating the same provisions for each of the extensions. (Emphasis supplied).

case law. *Lockheed Overseas Corporation v. Pillsbury*, 58 F.Supp. 375 (S.D. Cal. 1944).

## II. *The Decision Below Properly Construes 42 U.S.C. 1653(b).*

The enactment of the Longshoremen's Act Amendments in 1972 did nothing to alter, modify or conform any of the pre-existing statutory provisions of the Defense Base Act.

The construction of that Act by the Sixth Circuit will not create incongruity. In point of fact, if Petitioner's argument is correct, claims arising under the Defense Base Act would have to be reviewed in the United States Circuit Courts of Appeals which comprise such locations as Antarctica and Nepal<sup>2</sup>, rather than in the federal district court where the compensation order was entered or in the federal district court nearest the place of the injury or accident.<sup>3</sup> Since there are no such circuits<sup>4</sup>, such a result could not have been intended by the Congress and there was, therefore, no implicit repeal of the Defense Base Act review procedures.

Petitioner's contention that Congress' enactment of the LHWCA Amendments in 1972 repealed Section 1653(b) of the DBA by indirection cannot sustain

<sup>2</sup> *Vishniac v. University of Rochester, et al*, B.R.B. No. 76-431, 8 BRBS 21 (1978) (Accidental death occasioned by a fall in Antarctica in which the DBA was applied); *Smith v. Board of Trustees, Southern Illinois University, et al*, B.R.B. No. 77-474, 8 BRBS 197 (1978) (Accidental death in Kathmandu, Nepal in which a potential DBA claim was recognized).

<sup>3</sup> 42 U.S.C. 1653(b).

<sup>4</sup> 28 U.S.C. 41 (65 Stat. 723).

analysis under standard rules of statutory construction.

A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. In the absence of such intention subsequent amendment of the referred statute will have no effect on the reference statute. 2A Sutherland on Statutory Construction §51.08 (4th ed. C. Sands 1973). (Footnotes omitted).

**III. *The Decision Below Is Not Inconsistent With The Sixth Circuit's Opinion In Director, OWCP v. Eastern Coal Corporation (561 F.2d 632).*<sup>5</sup>**

The decision in *Eastern Coal* was concerned with the applicability of the LHWCA Amendments to the Black Lung Benefits Act and, as such, is clearly distinguishable, particularly since:

[T]he Black Lung regulation had never had any separate provisions for judicial review but had from the passage of this legislation in 1969 contained provisions incorporating the adjudicatory measures of the Longshoremen's Act. *Id.*, at 640.

The Defense Base Act, on the other hand, contained explicit judicial review provisions prior to the LHWCA Amendments of 1972. These provisions were unchanged by those Amendments.

<sup>5</sup> Even if the decision below does present a direct conflict with the earlier Sixth Circuit opinion that does not constitute sufficient grounds for review by this Court, *See, e.g., Wisniewski v. United States*, 353 U.S. 901 (1957).

**IV. *Although This Case Presents An Issue Not Heretofore Considered By This Court, Review Is Unnecessary.***

The decision of the court below has neither foreclosed the rights of persons subject to the provisions of the Defense Base Act nor has it created any doubt as to the status of those rights.

That decision simply clarifies the interrelationship between the Longshoremen's Act and the Defense Base Act; the new adjudicatory/administrative procedures of the former do apply to the latter but the judicial review provisions of the DBA remain in full force and effect.

Review by this Court is unnecessary. Petitioner points to no inter-circuit conflicts on this issue. Further development of the law should be left to the Congress or to the lower courts.

**V. *The Decision Below Will Not Impede The Administration Of Claims Under The Defense Base Act.***

Petitioner appears to argue that the decision of the Court of Appeals actually deprives the Benefits Review Board of subject matter jurisdiction over Defense Base Act claims since that Act, Section 1653(b), speaks only to a compensation order of a deputy commissioner, yet, pursuant to the 1972 Amendments to the Longshoremen's Act, in the present claim, there was no such compensation order involved.

It is true that, under the regulations implementing the Longshoremen's Act Amendments of 1972, com-

pensation orders in contested claims are prepared by the Administrative Law Judge (20 CFR 702.348).<sup>6</sup>

However, it is also clear that such compensation orders become effective only upon filing in the office of a deputy commissioner (20 CFR 702.350).<sup>7</sup> Thus, a deputy commissioner must act affirmatively to effectuate any compensation order and is "involved" with any such order (42 U.S.C. 1653(b)).

The opinion of the court below comprehends such a reading since the Sixth Circuit did not question the jurisdiction either of the Administrative Law Judge or of the Benefits Review Board to hear the subject compensation claim.

**VI. *The Decision Below Was Correct, Even Assuming That Petitioner's Reliance On 33 U.S.C. 921(c) Is Appropriate.***

Petitioner sought review of the decision of the Benefits Review Board, pursuant to 33 U.S.C. 921(c), in the United States Court of Appeals for the Sixth Circuit (Petition, at p. 8). The compensation claim at issue arose out of an injury which occurred at and on the United States Naval Base at Guantanamo Bay, Cuba (Petitioner's Appendix C, at p. 18a).

Section 921(c) of the Longshoremen's Act prescribes that judicial review of an administrative decision be taken "...in the United States Court of Appeals for the Circuit in which the injury occurred...".

<sup>6</sup> See, Appendix C herein.

<sup>7</sup> See, Appendix C herein.

As the court below noted:

Guantanamo Bay, Cuba is not included in any judicial circuit. More particularly, for our purposes, Guantanamo Bay is not in the Sixth Circuit. 597 F.2d 87,90. *See also*, 28 U.S.C. 41 (65 Stat. 723).

The Petitioner, even under its own view of the applicable review procedures, simply chose the wrong court in which to perfect review.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# **APPENDIX**



1a

**APPENDIX A - ORDER OF DISMISSAL**

UNITED STATES COURT OF APPEALS  
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**Order**

**May 1, 1979**

Before: CELEBREZZE, KEITH and MERRITT, *Circuit Judges.*

On petition for review of decisions of Benefits Review Board of the Department of Labor,

This cause came on to be heard on the briefs and record of proceedings before the Benefits Review Board of the Department of Labor and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to review be and it is hereby dismissed.

It is further ordered that Respondents recover from Petitioner the costs on appeal, as itemized below.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN  
John P. Hehman  
Clerk

ISSUED AS MANDATED:

June 29, 1979

COSTS: (To be awarded to  
respondent Travelers  
Insurance Co.)

Filing fee .....	\$ .....
Printing .....	\$ 856.27
TOTAL \$ 856.27	

APPENDIX B - LONGSHOREMEN'S AND HARBOR  
WORKERS' COMPENSATION ACT AND RELATED  
STATUTES, 20 CFR

ACTION BY DEPUTY COMMISSIONERS

§702.311 Handling of claims matters by deputy commissioners; informal conferences.

The deputy commissioner is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discussions by telephone or by conferences at the deputy commissioner's office. Some cases will be handled by written correspondence. The regulations governing informal conferences at the deputy commissioner's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the deputy commissioner and his staff shall make certain that a full written record be made of the matters discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

§702.312 Informal conferences; called by and held before whom.

Informal conferences shall be called by the deputy commissioner or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the deputy commissioner, except that a compensation order following an agreement shall be issued only by a person so designated by the Director to perform such duty.

**§702.315 Conclusion of conference; agreement on all matters with respect to the claim.**

(a) Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall (within 10 days after conclusion of the conference), embody the agreement in a memorandum or within 30 days issue a formal compensation order, to be filed and mailed in accordance with § 702.349. If either party requests that a formal compensation order be issued the deputy commissioner shall, within 30 days of such request, prepare, file, and serve such order in accordance with § 702.349. Where the problem was of such nature that it was resolved by telephone discussion or by exchange of written correspondence, the parties shall be notified by the same means that agreement was reached and the deputy commissioner shall prepare a memorandum or order setting forth the terms agreed upon. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.

(b) Where there are several conferences or discussions, the provisions of paragraph (a) of this section do not apply until the last conference. The deputy commissioner shall, however, prepare and place in his administrative file a short, succinct memorandum of each preceding conference or discussion.

**§702.316 Conclusion of conference; no agreement on all matters with respect to the claim.**

When it becomes apparent during the course of the informal conference that agreement on all issues cannot be reached, the deputy commissioner shall bring the conference to a close, shall evaluate all evidence available to him

or her, and after such evaluation shall prepare a memorandum of conference setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues. Copies of this memorandum shall then be sent by certified mail to each of the parties or their representatives, who shall then have 14 days within which to signify in writing to the deputy commissioner whether they agree or disagree with his or her recommendations. If they agree, the deputy commissioner shall proceed as in § 702.315(a). If they disagree (Caution: See § 702.134), then the deputy commissioner may schedule such further conference or conferences as, in his or her opinion, may bring about agreement; if he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the deputy commissioner shall prepare the case for transfer to the Office of the Chief Administrative Law Judge (See § 702.317, §§ 702.331-.351).

**§702.317 Preparation and transfer of the case for hearing.**

A case is prepared for transfer in the following manner:

(a) The deputy commissioner shall furnish each of the parties or their representatives with a copy of a pre-hearing statement form.

(b) Each party shall, within 21 days after receipt of such form, complete it and return it to the deputy commissioner and serve copies on all other parties. Extensions of time for good cause may be granted by the deputy commissioner.

(c) Upon receipt of the completed forms, the deputy commissioner, after checking them for completeness and after any further conferences that, in his or her opinion, are warranted, shall transmit them to the Office of the Chief Administrative Law Judge by letter of transmittal together with all available evidence which the parties intend to submit at the hearing (exclusive of X-rays, slides



and other materials not suitable for mailing which may be offered into evidence at the time of hearing); the materials transmitted shall not include any recommendations expressed or memoranda prepared by the deputy commissioner pursuant to § 702.316.

(d) If the completed pre-hearing statement forms raise new or additional issues not previously considered by the deputy commissioner or indicate that material evidence will be submitted that could reasonably have been made available to the deputy commissioner before he or she prepared the last memorandum of conference, the deputy commissioner shall transfer the case to the Office of the Chief Administrative Law Judge only after having considered such issues or evaluated such evidence or both and having issued an additional memorandum of conference in conformance with § 702.316.

(e) If a party fails to complete or return his or her pre-hearing statement form within the time allowed, the deputy commissioner may, at his or her discretion, transmit the case without the party's form. However, such transmittal shall include a statement from the deputy commissioner setting forth circumstances causing the failure to include the form, and such party's failure to submit a pre-hearing statement form may, subject to rebuttal at the formal hearing, be considered by the administrative law judge, to the extent intransigence is relevant, in subsequent rulings on motions which may be made in the course of the formal hearing.

#### § 702.331 Formal hearings; procedure initiating.

Formal hearings are initiated by transmitting to the Office of the Chief Administrative Law Judge the pre-hearing statement forms, the available evidence which the parties intend to submit at the formal hearing, and the letter of transmittal from the deputy commissioner as provided in § 702.316 and § 702.317.

#### § 702.391 Appeals; where.

Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeals with the office of the deputy commissioner for the compensation district in which the decision or order appealed from was filed and by submitting to the Board a petition for review of such decision or order, in accordance with the provisions of Part 802 of this Title 20.



**APPENDIX C - LONGSHOREMEN'S AND HARBOR  
WORKERS' COMPENSATION ACT AND RELATED  
STATUTES, 20 CFR**

**§ 702.348 Formal hearings; preparation of final decision  
and order; content.**

Within 20 days after the official termination of the hearing as defined by § 702.347, the administrative law judge shall have prepared a final decision and order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of facts and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge, his signature, and the date of issuance.

**§ 702.350 Finality of compensation orders.**

Compensation orders shall become effective when filed in the office of the deputy commissioner, and unless proceedings for suspension or setting aside of such orders are instituted within 30 days of such filing, shall become final at the expiration of the 30th day after such filing, as provided in section 21 of the Act 33 U.S.C. 921. If any compensation payable under the terms of such order is not paid within 10 days after it becomes due, section 14(f) of the Act requires that there be added to such unpaid compensation an amount equal to 20 percent thereof which shall be paid at the same time as, but in addition to, such compensation unless review of the compensation order is had as provided in such section 21 and an order staying payment has been issued by the Benefits Review Board or the reviewing court.